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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

TERRENCE ANDREW GRAHAM,

Defendant and Appellant.

C089323

(Super. Ct. Nos. SF111544A,  
STKCRFE20096385)

Defendant Terrence Andrew Graham appeals the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.95 (unless otherwise stated, statutory section references that follow are to the Penal Code), arguing that the trial court was statutorily prohibited from summarily denying his petition after determining that he failed to establish a prima facie case that he fell within the provisions of the statutory scheme. He contends a trial court must appoint counsel and allow the parties to file

responsive pleadings before determining whether a defendant has satisfied the prima facie criteria for resentencing.

We conclude the trial court did not err in summarily denying defendant's petition and affirm.

## FACTS AND PROCEEDINGS

Following the 2009 killing of Ralph Dillingham, defendant was charged with first degree murder (§ 187) during a robbery (§ 190.2, subd. (a)(17)(A)) while personally using a deadly weapon, a knife (§ 12022, subd. (b)(1)). He was further charged with second degree robbery and attempted second degree robbery with the personal use of a knife attached to both offenses.

In September 2010, defendant pleaded guilty to second degree murder in exchange for dismissal of the robbery special circumstance allegation as well as all other charges and alleged enhancements. The parties stipulated that the preliminary hearing transcript could serve as the factual basis for the plea. In November 2010, defendant was sentenced on the second degree murder conviction to 15 years to life in prison.

On January 25, 2019, defendant filed a form petition pursuant Senate Bill No. 1437 and section 1170.95 for resentencing on the murder conviction. In the petition, defendant averred that a complaint or information had been filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine, and that he pleaded guilty to first or second degree murder in lieu of going to trial because he believed he could have been convicted for first or second degree murder at trial under the felony murder rule or the natural and probable consequences doctrine; he did not specify in the petition which theory applied. According to the petition, he could not now be convicted of first or second degree murder based on changes made to sections 188 and 189, which became effective January 1, 2019. He requested that the court appoint him counsel in the resentencing proceeding.

On April 9, 2019, the trial court summarily denied the petition without first appointing defendant counsel as requested. The court found defendant had failed to make a prima facie showing that he was eligible for resentencing given the facts of his conviction, which the court recounted as follows:

In April 2009, defendant waited for a car to leave a minimart before he entered the store at nearly 2:00 a.m. wearing a mask and dark clothing and carrying a knife. He ordered the clerk to open the register and give him the money. The clerk--Ralph Dillingham--went behind the register and grabbed a pipe; a struggle between defendant and Dillingham ensued. Dillingham grabbed at defendant's knife while defendant grabbed the pipe, ultimately disarming Dillingham. Dillingham then went to the cash register and withdrew the cash. While bending over to place the cash in a shopping bag, Dillingham collapsed to the ground. Defendant reached over, took the money, and left. Dillingham was later found by another customer and transported to the hospital where he was declared dead. After examining Dillingham's body, the coroner found that he suffered an acute heart attack during, and as a result of, the robbery.

Based on the facts of defendant's offense, the court found that "[t]here [was] no question that [defendant] 'was a major participant in the underlying felony' and that he 'acted with reckless indifference to human life.' " Thus, defendant could have been convicted of first degree murder despite the newly-enacted changes to sections 188 and 189, and, therefore, he was not entitled to resentencing under Senate Bill No. 1437 and section 1170.95.

## DISCUSSION

Defendant contends the trial court erred by summarily denying his petition without following procedures which he claims newly enacted section 1170.95 mandates. In his view, section 1170.95 does not permit a court to preliminarily determine whether a defendant meets the statute's prima facie criteria. Instead, upon receiving a section

1170.95 petition, the trial court *must* first appoint counsel, if requested, and permit the parties to file responsive pleadings *before* determining whether the defendant has stated a prima facie case of eligibility. We disagree.

Senate Bill No. 1437 (2017-2018 Reg. Sess.), which became effective on January 1, 2019, revised the felony-murder rule in California “to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) The bill amended section 188, which defines malice, and section 189, which defines the degrees of murder to address felony-murder liability; it also added section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2-4; *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1133 (*Lewis*).)

Section 1170.95, subdivision (c) provides: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”

To make a prima facie showing, all three of the following conditions must apply:

“(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

“(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

[And]

“(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a).)

As relevant here, section 189 was amended to include new subdivision (e), which provides: “(e) A participant in the perpetration or attempted perpetration of a [robbery] in which a death occurs is liable for murder only if one of the following is proven:

“(1) The person was the actual killer.

“(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

“(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.” (Stats. 2018, ch. 1015, § 3.)

The parties here dispute the meaning of section 1170.95, subdivision (c). Defendant, as explained above, argues that the trial court cannot make a preliminary determination of whether a petitioner has made a prima facie showing under the statute until it appoints counsel and receives briefing from the parties. The People, on the other hand, argue that section 1170.95 authorizes a trial court to determine whether a petitioner has made the necessary prima facie showing that he or she falls within the provisions of section 1170.95 before appointing counsel and holding a hearing on the petition.

The People have the better argument. Interpreting the statute as defendant urges would render the first sentence of subdivision (c), which provides that “[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that

the petitioner falls within the provisions of this section,” mere surplusage. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799 [“a construction that renders a word surplusage should be avoided”]; see also *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010 [“It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided”].)

When interpreting statutory language, moreover, we do not examine language in isolation but consider the context of the statutory framework as a whole. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.) “When the statutory framework is, overall, chronological, courts will construe the timing of particular acts in relation to other acts according to their location within the statute; that is, actions described in the statute occur in the order they appear in the text.” (*Lewis, supra*, 43 Cal.App.5th at pp. 1139-1140, citing *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477 [statutory scheme’s sequential structure supports interpretation that acts required by the statute occur in the same sequence].) Applying this principle to section 1170.95, subdivision (c), the trial court must first determine whether a petitioner has made a prima facie showing that he or she “falls within the provisions” of the statute before appointing counsel, receiving briefs and then determining whether the petitioner has made “a prima facie showing that he or she is entitled to relief.” (§ 1170.95, subd. (c); *Lewis*, at p. 1140.)

We note, as *Lewis* recognized, “[i]t is not clear from the text of subdivision (c) what, if any, substantive differences exist between ‘the prima facie showing that the petitioner falls within the provisions of [section 1170.95],’ which is referred to in the first sentence of subdivision (c), and the ‘prima facie showing that [the petitioner] is entitled to relief,’ [which is] referred to in the last sentence of the subdivision.” (*Lewis, supra*, 43 Cal.App.5th at p. 1140, fn. 10.) Like in *Lewis*, we need not decide this issue because once the court properly concluded that defendant did not come within the provisions of

the statute, defendant necessarily was not entitled to relief, as a matter of law, based on the factual basis supporting his plea.

As other courts have recognized, “[a] prima facie showing of eligibility triggers the trial court’s obligation to issue an order to show cause and either hold a hearing, give the parties an opportunity [to] waive a hearing and stipulate to eligibility, or ‘[i]f there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner’s conviction and resentence the petitioner.’ ” (*People v. Ramirez* (2019) 41 Cal.App.5th 923, 929, citing § 1170.95, subds. (c), (d)(1) & (d)(2).) That is, only *after* the trial court determines that a petitioner has made a sufficient prima facie showing that he or she “falls within the provisions” of the statute is briefing done and a hearing held where the prosecution “has the burden to prove beyond a reasonable doubt[] that [a] petitioner is ineligible for resentencing.” (*Ramirez*, at p. 929; § 1170.95, subd. (d)(3).) Where the court concludes that the petitioner does not fall within the provisions of the statute, no purpose would be served by proceeding to the next stages (appointment of counsel, response by the prosecutor, order to show cause), and summary denial of the petition without a hearing is proper. Indeed, “ ‘[i]t would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief.’ ” (*Lewis, supra*, 43 Cal.App.5th at p. 1138.)

Here, the trial court properly found that the facts underlying defendant’s guilty plea to second degree murder established beyond a reasonable doubt that he killed Dillingham. (*Lewis, supra*, 43 Cal.App.5th at p. 1138 [trial court can consider record of conviction, including prior appellate court opinion, in making initial determination of whether a defendant falls within the provisions of section 1170.95]; *People v. Holmes* (2004) 32 Cal.4th 432, 436 [counsel can stipulate that preliminary hearing transcript

constitutes the factual basis for a defendant's plea].) As the "actual killer"--and the only person involved in the robbery that caused Dillingham's death--defendant did not fall within section 1170.95's resentencing provision because he clearly could be convicted of first or second degree murder under section 189 as amended by Senate Bill No. 1437. (§ 189, subd. (e).) That the trial court found defendant was a major participant in the robbery that acted with reckless indifference to human life rather than the actual killer is of no moment. A correct decision will not be reversed on appeal merely because it is given for the wrong reason. If the decision is correct for any reason, it must be affirmed, regardless of the reasons that may have moved the trial court to its ruling. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

Nor are we persuaded by defendant's argument that he should have been given the opportunity to prove he was not the actual killer because there was an insufficient causal connection between the victim's heart attack and his felonious conduct during the robbery. As the People note, defendant already had the chance to litigate the issue of whether his violent acts and Dillingham's fatal heart attack were merely coincidental. Instead, he chose to plead guilty to second degree murder thereby conclusively admitting that he killed Dillingham and relieving the prosecution of its burden to prove every element of the charged offense beyond a reasonable doubt. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456-1457.) Specifically, his plea relieved the prosecution of proving that his actions were a "substantial factor" in Dillingham's death, and admitted that they were. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584.)

Defendant's reliance on the drug diversion statute is equally unavailing. That the language employed in the two different statutory scheme varies does not mean that section 1170.95, subdivision (c)'s plain language does not authorize the trial court to conduct a preliminary review, especially where the statute specifically directs the trial court to "review the petition" and "determine if the petitioner has made a prima facie



showing that the petitioner falls within the provisions of this section.” (§ 1170.95, subd. (c).)

Because the trial court properly determined that defendant had failed to state a prima facie case that he fell within the provisions of section 1170.95, it did not violate defendant’s due process rights by summarily denying the petition. The trial court did not fail to follow the procedures mandated by section 1170.95.

#### DISPOSITION

The judgment is affirmed.

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HULL, Acting P. J.

We concur:

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ROBIE, J.

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BUTZ, J.